FOR ARGUMENT

Nos. 85-1377, 85-1378, 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER,
COMPTROLLER GENERAL OF THE UNITED STATES,
Appellant,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

UNITED STATES SENATE,
Appellant,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Appellants,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR *AMICI CURIAE* COALITION FOR HEALTH FUNDING, *ET AL.*

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April 9, 1986

[Complete list of *Amici* on inside cover]

AMICI CURIAE

American Council on Education

American Hospital Association

Coalition for Health Funding on behalf of:

- American Academy of Pediatrics
- American Association of Colleges of Nursing
- American Association of Colleges of Pharmacy
- American Association of Colleges of Podiatric Medicine
- American Association for Dental Research
- American Association of Dental Schools
- American Heart Association
- American Lung Association
- American Nurses Association
- American Public Health Association
- Association of American Veterinary Medical Colleges
- Association of Schools of Public Health
- Association of University Programs in Health Administration
- Cystic Fibrosis Foundation
- Infectious Diseases Society of America
- March of Dimes Birth Defects Foundation
- National Association of Children's Hospitals and Related Institutions
- National Family Planning and Reproductive Health Association
- National League for Nursing
- Planned Parenthood Federation of America

Juvenile Diabetes Foundation International

National School Boards Association

Western Association of Children's Hospitals

QUESTION PRESENTED

Whether the district court properly ruled that, because the automatic deficit reduction procedures of the Balanced Budget and Emergency Deficit Control Act are unconstitutional, the President's sequestration order issued pursuant to those procedures is "without legal force and effect," thereby requiring the restoration of all wrongfully cancelled funds?

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BRIEF FOR *AMICI CURIAE* COALITION FOR HEALTH FUNDING, *ET AL.*

The Coalition for Health Funding (the "Coalition") *et al.* submits this brief *amici curiae* on behalf of twenty-five organizations representing health and education in-

terests in support of Appellees Mike Synar, Member of Congress, *et al.* It is accompanied by the written consents of Appellants and Appellees.

INTEREST OF *AMICI CURIAE*

The Coalition for Health Funding is a nonprofit coalition of health organizations devoted to promoting and monitoring the funding of health care programs. The Coalition is joined in this brief *amici curiae* by several health and educational associations which share a similar interest in promoting funding for health and educational programs. (A list of *amici* is set forth in the Appendix attached hereto.) These associations are involved with virtually all federally-funded health and education programs. They represent the educational institutions that administer federally-funded research, public health and education grants; the providers of federally-funded health services, such as hospitals, physicians, nurses and family planning clinics; the recipients of federal research grants, student trainees and program administrators; and the voluntary health organizations that are concerned with the federally-funded programs that impact upon the health of the American public.

The March 1, 1986 sequestration order mandated by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, reduced duly enacted levels of support for most health and education programs by 4.3 percent, and reduced payments under the Medicare program by one percent. *Amici curiae* and their members were adversely impacted by these budget cuts, which forced significant curtailments in grants, traineeships and scholarships, reimbursement levels, contracts, and other health and educational services. Thus, these organizations have a direct interest in this Court's decision concerning the constitutionality of these budget reductions.

INTRODUCTION

A. The Deficit Control Act And Its Impact On Health And Education Programs

The Balanced Budget and Emergency Deficit Control Act of 1985 (the "Deficit Control Act" or "Act"), Pub. L. No. 99-177, 99 Stat. 1037 (1985), popularly known as the Gramm-Rudman Act, radically changes the federal budget process in an effort to achieve a balanced federal budget by the year 1991. In order to reach that goal, the Act imposes strict year-by-year deficit targets called "maximum deficit amounts", and adopts extraordinary new budget procedures. *See* Act §§ 201(a)(7), 251-257, J.A. 104, 109-161.

In accordance with these procedures, on January 15, 1986, the Congressional Budget Office ("CBO") and the Office of Management and Budget ("OMB") issued a joint report to the Comptroller General estimating the deficit for the 1986 fiscal year. Since they determined the deficit would exceed the designated maximum deficit amount, they calculated the requisite budget reductions for both nondefense and defense programs. The budget reductions amounted to 4.3 percent for most health and education programs, and one percent for Medicare. 51 Fed. Reg. 1917, 1930, 1934 (Jan. 15, 1986).[1] On January 21, 1986, the Comptroller General submitted his report to the President and the Congress appraising the accuracy of the CBO's and OMB's report and making minor changes. 51 Fed. Reg. 2813 (Jan. 21, 1986). Following the submission of the Comptroller General's report, on February 1, 1986, the President issued a "sequestration" order, containing the budget reductions man-

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[1] *See* Act § 256(d)(1)(A), J.A. 151 (setting the maximum permissible reduction for Medicare at one percent for fiscal year 1986).

dated in the Comptroller General's report. This sequestration became effective on March 1, 1986. S. Doc. No. 24, 99th Cong., 2d Sess. (1986); *see* Act § 252(a)(6)(A), J.A. 129. Accordingly, as of March 1, funding for all non-exempt [2] health and education programs was cut by 4.3 percent and funding for the Medicare program was cut by one percent.

The funds for health and education programs subject to the President's sequestration had all been duly authorized and appropriated by Congress.[3] The health and education programs funded under these appropriations acts include preschool, elementary, secondary and higher education, and a full range of health programs involving research, training, prevention and services. Specific programs include migrant education; early childhood education for handicapped children; student assistance for college and graduate students; maternal and child health grants; family planning services; exceptional need

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[2] Certain programs are totally exempt from Gramm-Rudman cuts. Medicaid, for example, is totally exempt. Act § 255(h), J.A. 148. Other programs are subject to special rules. *Id.* § 256, J.A. 148-158. These programs include: the Guaranteed Student Loan program, which was subject to a mandatory reduction of .4 percent in the special allowance for lenders and a .5 percent increase in the loan origination fee (51 Fed. Reg. 1932); the Community Health Centers and Indian Health Services programs, which received a one percent reduction (51 Fed. Reg. 1934); and the Vocational Rehabilitation grant program, which was subject to a reduction in the expected automatic spending increase (51 Fed. Reg. 1927, 1933).

[3] Department of Labor, Health and Human Services, Education and Related Agencies Appropriations Act for the Fiscal Year Ending September 30, 1986, Pub. L. No. 99-178, 99 Stat. 1102 (1985); Further Continuing Appropriations Act of 1985, Pub. L. No. 99-190, 99 Stat. 1185 (1985). Payment under the Medicare program is authorized under Title XVIII of the Social Security Act of 1965, as amended, Pub. L. No. 89-97 (codified at 42 U.S.C. § 1395 *et seq.*).

scholarships for health professions students; childhood immunization programs; clinical training for mental health researchers; and biomedical research on numerous life-threatening diseases, such as cancer and Acquired Immune Deficiency Syndrome (AIDS).

B. The District Court's Decision

On February 7, 1986, the three-judge district court held that the Deficit Control Act violates the separation of powers doctrine by granting executive powers to the Comptroller General, an officer removable by Congress. Because of this constitutional defect, the court concluded that "those powers cannot be exercised and therefore the automatic deficit reduction process to which they are central cannot be implemented." J.A. 78. The court issued an order declaring the automatic reduction process unconstitutional and declaring the February 1, 1986 presidential sequestration order issued pursuant to those unconstitutional procedures "without legal force and effect." J.A. 81-82. The court, as required by the judicial review provisions of the Act, stayed the effect of its judgment pending these appeals. J.A. 82.

SUMMARY OF ARGUMENT

In holding that the automatic deficit reduction procedures of the Deficit Control Act violate the separation of powers doctrine, the district court not only held that the application of the Act to future budget reductions is unconstitutional; it also declared the first reductions under the Act null and void. *Amici* endorse the arguments of Appellees in support of the district court's analysis of the constitutional issues. This brief, however, will be limited to the single issue of the district court's ruling that, because the budget reductions were made pursuant to unconstitutional procedures, the February 1, 1986 sequestration order is void and without legal effect.

In so ruling, the district court properly applied the long-standing rule of Anglo-American jurisprudence that judicial decisions are to be accorded retroactive treatment.

Nothing in this Court's decisions, including the standards established in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), dictate a departure from the normal rule of retroactivity. First, the district court's decision did not overturn prior law upon which individuals had relied. There was no justifiable reliance on the validity of the Deficit Control Act, since its dubious constitutionality was foreshadowed well before it was enacted into law and it was subject to constitutional challenge from the moment it became effective. In the absence of appropriate reliance, retroactive relief should be applied.

Second, retroactive application of the district court's decision furthers the purpose of the court's decision by denying effect to the unconstitutional withholding of duly authorized funds. Third, the equities in this case clearly favor voiding the sequestration order and restoring the funds to the innocent third parties, such as *amici*, who have had their legal rights to funds extinguished by unconstitutional procedures. Accordingly, *amici* urge the Court to affirm the district court's order entirely, including its order that the budget reductions wrongfully taken are null and void, with the effect that these reductions in lawful appropriations must be restored to the affected programs.

ARGUMENT

I. BECAUSE THE PRESIDENT'S SEQUESTRATION ORDER WAS BASED ON AN UNCONSTITUTIONAL PROCEDURE, THE ORDER IS NULL AND VOID OF ANY LEGAL EFFECT, AND THE FUNDS PERMANENTLY CANCELLED UNDER SUCH ORDER MUST BE RESTORED

The district court properly held that, since the automatic deficit reduction procedures are unconstitutional, the February 1, 1986 sequestration order issued pursuant to those procedures is null and void of any legal effect. J.A. 81-82. Moreover, in the context of discussing whether the National Treasury Employees Union ("NTEU") had standing to challenge the constitutionality of the Act, the court indicated that a judicial decision declaring the Deficit Control Act unconstitutional would require the restoration of funds:

> As to at least the second of the injuries of which NTEU complains—the imminent permanent cancellation of its members' COLA benefits by the operation of the presidential sequestration order—it is unquestionable that a judicial remedy exists. *If we declare the automatic deficit reduction process invalid, no cancellation of the COLA benefits will occur as a result of that process.* Rather, the fallback deficit reduction process established by subsection 274(f) will come into play, and any cancellation of COLAs under that process will require the passage of legislation.

J.A. 35 (footnotes omitted and emphasis added).

Nothing in this Court's decisions indicate that the district court's holding should not be applied retroactively. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court established a three-part test for determining whether in a civil case a decision should be treated retroactively:

- *First*, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . .

- *Second*, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . .

- *Finally*, "[w]here a decision . . . could produce substantial inequitable results if applied retroactively, there is ample basis . . . for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-07 (citations omitted and emphasis added). The *Chevron* test developed as an exception to the long-standing rule of Anglo-American law that judicial decisions are retroactive[4] to account for those extraordinary circumstances where the Court deemed it appropriate to depart from the normal rule of retroactivity.

The initial *Chevron* factor—establishing a clear break from prior law upon which the parties relied—is the threshold test for determining whether a decision should be applied retroactively:

> Once it has been established that a decision has "establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed," the Court has gone on to examine the history, purpose, and effect of the new rule, as well as the

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[4] *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 622-23 and n.6 (1965); Norton v. Shelby County, 118 U.S. 425, 442 (1886).

inequity that would be imposed by its retroactive application.

United States v. Johnson, 457 U.S. 537, 550 n.12 (1982) (*quoting Chevron*, 404 U.S. at 106-107); *see also Cash v. Califano*, 621 F.2d 626, 631 (4th Cir. 1980) (reliance is the threshold factor). In virtually all of the civil cases in which decisions have been applied prospectively, courts have determined that retroactivity was inappropriate because individuals had relied on prior law and conformed their conduct to that prior law or the *status quo ante*.[5]

In contrast, this case does not involve a rule of law which regulates individual conduct and upon which individuals have relied. Rather, it involves whether certain federal budget procedures violate the separation of powers doctrine. Thus, by its very nature, retroactive application of the district court's decision in this case raises few, if any, of the difficult issues addressed by the *Chevron* factors and this Court's other retroactivity decisions. *See Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940). Assuming the *Chevron* analysis nonetheless is the starting point for determining questions of retroactivity, the *Chevron* factors clearly support affirmance of the district court's decision to accord retroactive treatment to its order declaring the presidential sequestration order void of any legal effect.[6]

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[5] *E.g.*, Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1105-07, 1109-10 (1982) (plurality); Northern Pipeline Construction Co. v. Marathon Oil Co., 458 U.S. 50, 88 (1981); City of Los Angeles Dept. of Power and Water v. Manhart, 435 U.S. 702, 722-23 (1978); *Chevron*, 404 U.S. at 108.

[6] The courts have also recognized that application of the *Chevron* factors "is not accomplished through a discrete reference to each separate factor, but by an analysis of how they interact with one another." *Cash v. Califano*, 621 F.2d at 629. Thus, to deny retroactive application, a decision must not only meet the threshold

A. The Court's Decision Does Not Establish A New Principle Of Law

All of the cases in which this Court has applied decisions only prospectively emphasized the parties' appropriate reliance on the state of the law prior to the decision. Several of these cases announced completely new procedural interpretations which would have prejudiced potential plaintiffs relying on the former law from seeking relief. In *Chevron*, for instance, this Court applied prospectively its decision that the state statute of limitations applied in cases brought under the Outer Continental Shelf Lands Act, reasoning that when the plaintiff was injured and initiated his suit, he could not foresee that the prior interpretation of the statute would be overturned. "The most he could do was rely on the law as it then was." *Chevron*, 404 U.S. at 107.[7]

Other cases have involved substantive interpretations of laws in which parties had relied in good faith on prior legal precedent. In *Manhart*, this Court gave prospective treatment to its decision that Title VII of the Civil Rights Act of 1964 prohibits an employer from requiring women to make larger pension contributions in order to obtain the same monthly benefits as men, noting that its decision imposed "[d]rastic changes in the legal rules governing pension and insurance funds," and that the employer, relying on prior law, could have believed his pension plan was lawful. *Id.* at 720-21.[8]

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reliance factor; it must meet all of the *Chevron* factors. Cochran v. Birkel, 651 F.2d 1219, 1223 n.8 (6th Cir. 1981), *cert. denied*, 454 U.S. 1152 (1982).

[7] *See also Northern Pipeline*, 458 U.S. at 88; England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 422 (1964).

[8] *See also* Lemon v. Kurtzman, 411 U.S. 192 (1973) (plurality); City of Phoenix v. Kolodziejski, 399 U.S. 204, 213-15 (1970); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969).

By contrast, in this case the dubious constitutionality of the Deficit Control Act was apparent even before the bill was signed into law. First, this Court's unanimous decision in *Buckley v. Valeo*, 424 U.S. 1 (1975) (per curiam), established unequivocally that legislative officials may not exercise executive duties.[9] In addition, this Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), established that legislation—as well as the repeal of duly authorized legislation—can only be enacted through constitutionally prescribed procedures. Certainly these decisions paved the way for the conclusion that the Deficit Control Act violated the fundamental principle of separation of powers.

Second, the legislative history of the Act demonstrates that Congress itself recognized that the automatic deficit reduction procedures raised serious constitutional concerns. During congressional debate on the Gramm-Rudman bill, members of Congress observed several constitutional defects in the Act.[10] Professor Laurence H.

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[9] Appellant Comptroller General points to a footnote in *Buckley v. Valeo* (424 U.S. at 128 n.165) to argue that that decision upheld the Comptroller General's authority to exercise administrative functions. Brief for Appellant Comptroller General of the United States ["GAO Brief"] at 29. Yet nothing in this Court's casual reference to the Comptroller General indicates that, as an officer removable by Congress, he is authorized to exercise the executive functions conferred on him under the Deficit Control Act. Indeed, the footnote does not even address the removal issue. Rather, the decision makes clear that "administrative functions may . . . be exercised only by persons who are 'officers of the United States.'" 424 U.S. at 141 (footnote omitted).

[10] Just prior to House passage, Representative Oakar read a letter into the record from the Chairman of the House Judiciary Committee, Representative Rodino, detailing his opposition to the bill on the grounds that this Court's decision in *Chadha* established that "Congress cannot undo a law by anything short of a new law, and that all laws must be adopted through . . . constitutionally mandated procedures . . ." and that this Court's decision in *Buckley v. Valeo* reaffirmed that "the principle of separation of powers was

Tribe also expressed his views to the Congress that the bill contained "serious [constitutional] infirmities that merit the closest attention" and that "[g]iving executive duties to a legislative officer is almost certainly unconstitutional," citing *Buckley v. Valeo.*[11]

Given these concerns regarding the constitutionality of the Act, the framers included provisions facilitating constitutional challenge. First, the Act includes a provision conferring standing upon Members of Congress to seek a declaratory judgment and injunctive relief concerning the constitutionality of the Act. Act § 274(a)(2), J.A. 163. Second, the Act includes provisions for expedited judicial review of a constittuional challenge. *Id.* § 274 (c), J.A. 164.

Moreover, Congress included in the Act a so-called "fallback deficit reduction" provision to be employed in the event the automatic deficit reduction process were declared unconstitutional. Act § 274(f), J.A. 165-66. Under the fallback provision, budget reductions can be required only by a joint resolution of Congress, signed by the President. *Id.* The fallback provision thus represents an implicit admission by Congress that if the Act were declared unconstitutional, the budget reductions would be invalid and would have to be restored, absent lawfully enacted legislation. Indeed, Appellant Comptroller General of the United States concedes this point in his brief by observing that, "[s]ince this fallback depends on the passage of another law, it is essentially a return to the *status quo ante.*" GAO Brief at 5.

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not simply an abstract generalization . . . ." 131 Cong. Rec. H11893-94 (daily ed. Dec. 11, 1985); *see also id.* H11881 (Rep. Waxman) (court should rule the law unconstitutional); *id.* H11885 (Rep. Rodino) (bill is unconstitutional); *id.* H11891 (Rep. Levine) (same).

[11] 131 Cong. Rec. H9608-09 (Nov. 1, 1985) (letter from Professor Laurence H. Tribe to Hon. Mike Synar (Oct. 22, 1985)).

Even the President, when signing the Gramm-Rudman bill into law, observed that the bill raised "serious constitutional questions":

> In signing [the Gramm-Rudman] bill, I am mindful of the serious constitutional questions raised by some of its provisions. The bill assigns a significant role to the Director of the Congressional Budget Office and the Comptroller General in calculating the budget estimates that trigger the operative provisions of the bill. Under the system of separated powers established by the Constitution, however, executive functions may only be performed by officers in the Executive Branch. The Director of the Congressional Budget Office and the Comptroller General are agents of Congress, not officers in the Executive Branch.[12]

Finally, Representative Synar initiated his suit seeking declaratory relief on the constitutionality of the Act on December 12, 1985, the same day the bill was signed into law. Thus, there was a constitutional cloud over the Act from the moment it became effective. No one could have placed any reliance on the validity of the Act at any point, for all the actions taken pursuant to its provisions took place well after its constitutionality was challenged.

A decision declaring the Deficit Control Act unconstitutional thus does not overrule clear precedent; indeed, such an outcome was foreshadowed by *Buckley v. Valeo*, as well as other Supreme Court precedent. Second, the decision does not change existing law upon which the parties relied. In *National Ass'n of Broadcasters v. FCC*, 554 F.2d 1118 (D.C. Cir. 1976), the United States Court of Appeals for the District of Columbia Circuit applied a decision of this Court retroactively to require the FCC to refund illegally assessed fees where the FCC

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[12] President's Statement on Signing H.J. Resolution 327 Into Law, 21 Weekly Comp. Pres. Doc. 1490, 1491 (Dec. 12, 1985).

was unable to demonstrate justifiable reliance on the old rule:

> since the FCC had notice almost from the time it adopted the schedule that it would be subject to a challenge in court, there could be no justifiable reliance here. . . . For the same reason, because of the immediate protests and refund requests made by the petitioners, we reject any idea that the Commission would be unfairly surprised by our action today as well as the notion that petitioners' "transactions" had become final and should not be disturbed.

Id. at 1132 (footnotes omitted). The same is true in this case. From the day the bill was signed into law it was subject to a constitutional challenge, thereby removing any possibility that Appellants could be unfairly surprised by the district court's decision.

This Court has recognized that in the absence of justifiable reliance on the prior law, there is no basis for limiting relief prospectively. *See Johnson*, 457 U.S. at 550 n.12; *Lemon v. Kurtzman*, 411 U.S. at 203-06. In light of the extraordinary amount of concern over the constitutionality of the Act, and the fact that it was challenged in court on the day it became effective, there simply was no basis for reliance on the validity of the Act. Thus, since this case does not even meet the threshold reliance factor, there is no reason to apply the decision prospectively. Accordingly, the retroactivity analysis need go no further.[13]

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[13] *See Johnson*, 457 U.S. at 550 n.12; Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 1289 (7th Cir. 1980) ("Having decided that our ruling in this case establishes no new principle of law, it is unnecessary to address the remaining prongs of the *Chevron Oil* test"), *rev'd on other grounds*, 452 U.S. 205 (1981); Schaefer v. First National Bank, 509 F.2d 1287, 1294-95 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); Cash v. Califano, 621 F.2d at 631.

B. Requiring Restoration Of The Unlawfully Cancelled Funds Would Further The Purposes Of The Court's Decision

Even assuming, *arguendo*, that the remaining factors of the *Chevron* test need be considered, it is clear that retroactive application of the district court's decision was appropriate. The second factor under the *Chevron* framework is whether, considering the purposes and effect of the court's ruling, retroactive application "will further or retard its application." *Chevron*, 404 U.S. at 107. Thus, in *Chevron*, this Court determined that a primary purpose of the Lands Act in adopting the state statute of limitations as federal law was to aid injured employees by affording them complete and familiar remedies. Thus, to apply its decision retroactively to bar the plaintiff's claim would be "inimical to the beneficent purpose of the Congress." *Id.* at 108.

In this case, the purpose of an affirmance of the district court's order invalidating the automatic deficit reduction procedures is to maintain the delicate balance and separation of powers which underlie our constitutional framework of government. A prospective-only decision in this case which did not require restoration of withheld funds would retard operation of the rule by sanctioning the reduction of funds pursuant to unconstitutional means. It is well established that the Executive lacks any inherent constitutional power to refuse to spend funds duly appropriated by Congress. *Kendall v. United States ex. rel. Stokes*, 37 U.S. 524 (1838); *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973); *National Council of Community Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897 (D.D.C. 1973). Actions taken pursuant to unconstitutional procedures have no legal effect. *See INS v. Chadha*, 462 U.S. 919 (1983). Moreover, this Court has recognized in constitutional adjudication and elsewhere that federal courts have broad equitable powers to shape relief to meet the neces-

sities of a particular case. *E.g.*, *Lemon v. Kurtzman*, 411 U.S. at 200-01; *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).[14] Thus, affirmance of the district court's order would further implementation of the constitutional rule.

C. The Equities In This Case Clearly Favor Restoring The Unlawfully Cancelled Funds

The final factor considered under the *Chevron* standard is whether retroactive application of the decision would produce "substantial inequities." *Chevron*, 404 U.S. at 107. This inequity factor is closely tied to the initial reliance factor. In *Cipriano v. City of Houma*, for example, this Court concluded that retroactive application of its decision would impose "[s]ignificant hardships . . . on cities, bondholders, and others connected with municipal utilities" who had relied in good faith on the validity of the municipal financing scheme. 395 U.S. at 706. Similarly, in the *Chevron* decision itself, this Court concluded that retroactive application of its decision on the applicable statute of limitations "would also produce the most 'substantial inequitable results' to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation that the law imposed upon him." *Chevron*, 404 U.S. at 108 (citations omitted).

This Court has also applied the doctrine of nonretroactivity where the parties that would have been adversely affected by the Court's decision were innocent of any

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[14] For example, the federal district courts have equitable power to require funds improperly withheld to be made available for their designated purposes even where funds have reverted to the treasury, *e.g.*, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Donovan, 570 F. Supp. 210, 220 (D.D.C. 1983), or to require that funds improperly withheld in one fiscal year be spent in the following fiscal year, along with funds specially appropriated for that second fiscal year. Kennedy v. Mathews, 413 F. Supp. 1240, 1245 (D.D.C. 1976).

wrongful conduct. In *Norris*, this Court denied retroactivity where, under the new rule, "[t]he harm would fall in large part on innocent third parties." 463 U.S. at 1110 (O'Conner, J., concurring) (*quoting Manhart*, 435 U.S. at 722-23); *see also Cipriano*, 395 U.S. at 706.

In this case, retroactive application of the district court's decision would not produce such inequitable results. Indeed, *non*retroactive application of the decision would cause just the type of harm to innocent third parties, such as *amici* and their members, that this Court felt obligated to avoid in *Norris* and *Manhart*. The automatic deficit reductions have resulted in substantial harm to third parties who have been wrongfully denied their legal rights to federal funds. Indeed, because the sequestration order imposes across-the-board percentage reductions, smaller programs are most acutely affected by the unlawful withholding of funds. A chart illustrating the sequestered amounts in selected health and education programs is set forth in the Appendix attached hereto. These include mandated budget cuts eliminating:

- $236 million in funding for the National Institutes of Health ("NIH") research support, necessitating across-the-board funding cuts in all on-going research and training programs, irrespective of need or merit;[15]
- one percent in payments to all hospitals, physicians, nurses, clinics, nursing homes, medical equipment suppliers and other health care providers participating in the Medicare program who are already operating at severely reduced levels of reimbursement;[16]

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[15] U.S. Department of Health and Human Services, Report on Sequestration Under the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings) for Committee on Appropriations 1986, 63-92 (1986) ["HHS Sequestration Report"].

[16] U.S. Department of Health and Human Services, Health Care Financing Administration, Transmittal No. 86-2 (Feb. 1986) (in-

- $10,077,000 in funding for AIDS research at a time when scientists are coming closer to identifying the cause of and the cure for this fatal disease; [17]
- 424 training grants awarded to young researchers by the NIH; [18]
- funding for 65,000 children to receive immunizations against childhood diseases; [19]
- thirty-five grants of regional and national significance from the Maternal and Child Health program; [20]
- funds under the Community Health Centers program to expand health services in ten rural communities for an additional 50,000 people; [21]
- eighteen health professions scholarships for students in exceptional financial need; [22]
- traineeship positions for 252 public health and 100 nursing students; [23]

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structions to Medicare intermediaries for implementing one percent reduction in payments); Department of Health and Human Services, Health Care Financing Administration, Transmittal No. LM86-1 (Feb. 1986) (instructions to Medicare carriers for implementing one percent reduction in payments).

[17] S. Doc. No. 24, 99th Cong., 2d Sess. 397-430 (1986).

[18] HHS Sequestration Report at 65.

[19] Hearings on the Federal Childhood Immunization Program before the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce (Mar. 10, 1986) (statement of Chairman Waxman).

[20] HHS Sequestration Report at 5.

[21] *Id.* at 6.

[22] *Id.* at 16.

[23] *Id.* at 18, 24.

- some 290,000 middle-income college students from the Pell grant financial assistance program; [24] and
- twenty-eight projects and service to 9,209 students under the bilingual education program.[25]

Clearly the equities in this case favor the intended recipients of federal funds, such as amici, who have had their legal rights to duly authorized funds extinguished pursuant to an unlawful procedure. "[T]he equities weigh more heavily in favor of granting retroactive relief where the party bearing the burden of retroactive application can be charged with acting unlawfully." *Atlantic Richfield Co. v. FEA*, 463 F. Supp. 1079, 1086 (N.D. Cal. 1979). Simply because the restoration of funds will have a financial impact is insufficient to tip the scales of equity. "A financial impact alone is an insufficient basis to mandate nonretroactivity." *Cash v. Califano*, 621 F.2d at 632.

Moreover, as noted, since the constitutionality of the Act has always been in question, there was no basis for any reliance on its validity. In the absence of some surprise engendered by a new decision, the Appellants can hardly claim that equities support a ruling of nonretroactivity. Accordingly, this Court should affirm the district court's decision, thus requiring restoration of all funds unlawfully cancelled.

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[24] The Committee for Education Funding, Budget Impact Alert, The President's Proposed Budget for Education and Its Impact for Fiscal Year 1986, 82 (1986).

[25] *See generally id.* at 61.

CONCLUSION

For the reasons set forth herein, the decision of the district court should be affirmed.

Respectfully submitted,

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April 9, 1986